IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
v.	:	
MASO DODD	:	**NO. 00-598**

DUBOIS, J. **DECEMBER 27, 2001**

MEMORANDUM

I. INTRODUCTION

On September 27, 2000, defendant, Maso Dodd, was indicted by the Grand Jury and charged with possession with intent to distribute approximately seven grams of cocaine, in violation of 21 U.S.C. § 841(a)(1) (Count One), and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Two). The Indictment also charged the defendant with criminal forfeiture under 21 U.S.C. § 853.

On February 2, 2001, defendant pled guilty to the reduced charge of simple possession of cocaine, in violation of 21 U.S.C. § 844(a), and possession of firearm by a convicted felon, as charged in Count Two of the Indictment. Defendant was sentenced to a term of imprisonment of fifty-one (51) months on June 26, 2001. Defendant did not appeal his sentence.

On October 23, 2001, defendant filed a pro se document entitled "Motion to Modify Term of Imprisonment and for a Lesser Harms Departure Pursuant to 18 U.S.C. § 3582 (c)(2) and U.S.S.G. § 5K2.11."

On October 30, 2001, the Court issued an Order pursuant to U.S. v. Miller, 197 F.3d 644

(3rd Cir. 1999), requiring that Dodd notify the Court within thirty (30) days whether he desired that the Court decide his pro se Motion as filed or whether he intended to file one new all inclusive motion under 28 U.S.C. § 2255 within the one (1) year time limit. Defendant failed to respond to the October 30th Order within thirty (30) days although, on December 10, 2001, he wrote to the Court inquiring about the October 30, 2001 Order.[1]

On December 20, 2001, the Government responded to defendant's Motion.

For the reasons stated below, defendant's pro se Motion to Modify Term of Imprisonment and for a Lesser Harms Departure Pursuant to 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 5K2.11 will be denied.

II. DISCUSSION

A. Motion to Modify Term of Imprisonment Pursuant to 18 U.S.C. § 3583(c)(2)

18 U.S.C. § 3582(c)(2) provides as follows:

> The court may not modify a term of imprisonment once it has been imposed except that . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

The above statute enables a court to reduce a term of imprisonment under certain circumstances in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), and the Commission announces that the amendment is to be

[1]A copy of defendant's December 10, 2001 letter shall be docketed.

applied retroactively. See, e.g., United States v. Perez, 129 F.3d 255, 258 (2d Cir. 1997) (§ 3582 applies only where a guideline is amended and the amendment is expressly made retroactive by Sentencing Commission), cert. denied, 525 U.S. 953 (1998); United States v. Drath, 89 F.3d 216, 217 (5th Cir. 1996) (same). There has been no change in the guideline sentencing range used by the Court at sentencing in this case. Thus, defendant is not entitled to any relief under 18 U.S.C. § 3582(c)(2).

B. Motion for a Lesser Harms Departure Pursuant U.S.S.G. § 5K2.11

To the extent defendant is entitled to any relief with respect to this part of his Motion, he must qualify for relief under 18 U.S.C. § 2255. Thus, the Court will address the lesser harms departure issue as if defendant claimed ineffective assistance of counsel under that statute.

1. Ineffective Assistance of Counsel - Standard

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must meet both prongs of a two-part test elaborated by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Under this test, the petitioner bears the burden of showing that (1) counsel's conduct was so deficient that it "fell outside the wide range of professionally competent assistance," and (2) that the petitioner was prejudiced as a result of this deficient conduct. Id. at 687.

To establish ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness." United States v. Mannino, 212 F.3d 835, 840 (3d Cir. 2000) (quoting United States v. Strickland, 466 U.S. 668, 688 (1984)). In order to satisfy the second prong of the Strickland test - the prejudice prong - a defendant bears the burden of proving that, but for the alleged ineffective representation, there is

a "reasonable probability that the outcome . . . would have been different." Id. at 694.

2. Defendant's Counsel was not Constitutionally Ineffective Because the Lesser Harms Departure Argument is Without Merit

Defendant's lesser harms departure argument is based on the position that his criminal conduct in this case does not represent the "harm or evil sought to be prevented by the law proscribing the offense at issue," and that counsel was ineffective for not arguing at sentencing that defendant was entitled to a downward departure under U.S.S.G. § 5K2.11. That provision of the Guidelines reads as follows:

> Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.
>
> In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

In advancing this argument defendant asserts that the gun he was found to possess actually belonged to his wife and therefore was never "physically" possessed by him. In response, the Government points out that the gun, although registered to defendant's wife, was in defendant's bedroom and in close proximity to drug money, drugs, and drug paraphernalia.

Based on all of the facts and circumstances of the case, it is clear that defendant would not have been entitled to a downward departure under U.S.S.G. § 5K2.11 even if his attorney had advanced the argument at sentencing. The Court's conclusion is based on the myriad of cases,

similar to this one, in which courts of appeals have affirmed a district court's denial of a 5K2.11 departure under similar facts. See, e.g., United States v. Reynolds, 215 F.3d 1210 (11th Cir.) (affirming district court's denial of a § 5K2.11 departure where conduct in case involved the mere possession of an otherwise legal shotgun which defendant claimed he possessed for the purpose of pawning to remove it from access by a teenager), cert. denied, 215 F.3d 1210 (2000); United States v. Cutright, No. 00-4508, 2000 WL 1663451 (4th Cir. Nov. 6, 2000) (unpub. op.) (denying § 5K2.11 departure in gun possession case and finding that "the district court improperly considered Cuthbert's purported innocent purpose for possessing the firearm"). In Cutright, the firearms defendant was charged with possessing was in close proximity to defendant's drugs and his person at the time of this arrest. That led the court to conclude that defendant's "possession of three firearms was precisely the harm sought to be prevented by § 922(g)." Id. at *4.

A conviction under § 922(g) focuses on a defendant's status as a convicted felon, not on the reason for possessing the firearm. United States v. Reynolds, 215 F.3d at 1214. The purpose of the statute is to prevent persons who, as convicted felons, have demonstrated their inability to conform their conduct to the law from having control over dangerous weapons. See Barrett v. United States, 423 U.S. 212, 218, 220-21 (1976) (interpreting a prior version of § 922(g)).

The cases in which downward departures have been granted under § 5K2.11 are dramatically different from this case. See e.g., United States v. Hancock, 95 F. Supp. 2d 280 (E.D.Pa. 2000) ("Hancock's conduct regarding the instant offense is well outside the norm of the ordinary felon in possession of a firearm case. . . . He happened upon the weapon by chance, possessed it for a very short period of time for the purpose of disposing of it, and, once he realized that his attempt to unload the weapon by firing it was ill-advised, he discarded the

weapon immediately. As Hancock argues, such behavior is atypical of the ordinary violation of 18 U.S.C. § 922(g)(1)"); United States v. Lewis, 249 F.3d 793 (8th Cir. 2001) (firearm in question was a family heirloom which defendant inherited from his father and gave to his son upon his conviction; facing financial hardship and threatened with immediate disconnection of utilities, defendant obtained possession of the firearm for the sole purpose of pawning it to obtain cash to pay bills. Because the shotgun was a family heirloom, defendant returned to the pawn shop a few days later to attempt to retrieve it, but was denied the chance to reclaim the gun because of his prior conviction. The defendant's wife repurchased the gun and give it back to their son.)

Defendant has failed to establish that his attorney's conduct was so deficient that it "fell outside the wide range of professional and competent assistance." He argues only that his attorney should have filed a § 5K2.11 departure motion at sentencing. Because any such motion would have been denied, defendant has failed to establish that he is entitled to relief.

III. CONCLUSION

For all of the foregoing reasons, defendant's pro se Motion to Modify Term of Imprisonment and for a Lesser Harms Departure Pursuant to 18 U.S.C. § 3582 (c)(2) and U.S.S.G. § 5K2.11, treated as a Motion to Vacate, Set Aside or Correct Sentence under 18 U.S.C. § 2255, will be denied.

An appropriate Order follows: